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IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA *EX REL.*
THEODORE R. ANDERSON,

Cross-Petitioner/Respondent,

v.

NORTHERN TELECOM INC.,
a Delaware corporation,

Cross-Respondent/Petitioner.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the court of appeals, having expressly rejected the factual findings that constituted the sole basis for the district court's grant of summary judgment, nonetheless affirm the dismissal on the basis of alternative factual findings as to which the appellant has never been afforded the opportunity to submit responsive argument or evidence, and which, given the opportunity, appellant could prove were mistaken?

2. Is there a cause of action under the False Claims Act for sales of items that the seller knew at the time it billed the government did not meet express contractual warranties?

LIST OF PARTIES

United States of America
Theodore R. Anderson
Northern Telecom Inc.

TABLE OF CONTENTS

		Page
OPINIONS BELOW		2
JURISDICTION		2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED		3
STATEMENT OF THE CASE		4
A.	Procedural Posture	4
B.	Anderson's Claim	4
C.	Facts Material To Issue No. 1	5
1.	The Basis For The District Court's Dismissal Of The Letterkenny Claim, And The Ninth Circuit's Express Rejection Of That Basis	5
2.	The Ninth Circuit's Alternative Findings of Fact	6

3. The Absence Of Any Opportunity To Submit The Evidence To The Lower Courts..... 6

4. The Internal NTI Documentary Evidence That The Ninth Circuit's Alternative Findings of Fact are Mistaken..... 7

D. Facts Material To Issue No. 2..... 9

1. The Internal NTI Documentation Of Defects In Its Systems And The Systems' Inability To Meet Contractual Warranties..... 9

2. Letterkenny's Defective NTI System..... 11

3. NTI's Repair..... 12

4. The Ninth Circuit Opinion..... 12

REASONS FOR GRANTING THE WRIT..... 14

I. THE COURTS OF APPEALS NEED CLEAR INSTRUCTION REGARDING THE LIMITS OF THEIR POWER TO AFFIRM SUMMARY JUDGMENTS ON ALTERNATIVE BASES..... 14

II. THIS COURT HAS NEVER DIRECTLY ADDRESSED PRECISELY WHAT CONDUCT VIOLATES THE FALSE CLAIMS ACT AND, AS A CONSEQUENCE, THE LOWER COURTS ARE CONFUSED WITH RESPECT TO IMPORTANT ELEMENTS OF THE OFFENSE..... 18

CONCLUSION..... 22

TABLE OF AUTHORITIES

Cases	Page
Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 808-810 (D. Utah, 1988)	19,20
Box v. A&P Tea Co., 772 F.2d 1372, 1376 (7th Cir., 1985) *cert. denied* 478 U.S. 1010 (1986)	17
Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir., 1990)	16
Fidelity Financial Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1437 (9th Cir., 1986) *cert denied* 479 U.S. 1064 (1987)	17
Fountain v. Filson, 337 U.S. 921 (1949)	14,17
Griffith v. State of Colorado, 17 F.3d 1323, 1328 (10th Cir., 1994)	17
Heirs of Fruge v. Blood Services, 506 F.2d 841, 844 (5th Cir., 1975)	17
Hoffa v. Fitzsimmons, 673 F.2d 1345, 1361 (D.C. Cir., 1982)	17
Hormel v. Helvering, 312 U.S. 552, 556 (1941)	15

Katter v. Arkansas Louisiana Gas Co.,
765 F.2d 730 (8th Cir., 1985)..... 16

Paskaly v. Seale, 506 F.2d 1209, 1211
(9th Cir., 1974)..... 17

Patz v. St. Paul Fire and Marine Insurance Co.,
15 F.3d 699, 703 (7th Cir., 1994)..... 17

Rainwater v. U.S., 356 U.S. 590 (1958)..... 19

Rex Trailer Company v. U.S., 350 U.S. 148
(1956)..... 19

Singleton v. Wulff, 428 U.S. 106 (1976)..... 14,15

Tanner v. U.S., 483 U.S. 107 (1987)..... 19

U.S. v. Aerodex, Inc., 469 F.2d 1003
(5th Cir., 1972)..... 20

U.S. v. Bornstein, 423 U.S. 303 (1976)..... 19

U.S. v. Cooperative Grain and Supply Co.,
476 F.2d 47 (8th Cir., 1973)..... 20

U.S. v. Fox Lake State Bank, 366 F.2d 962
(7th Cir., 1966)..... 20

U.S. v. Halper, 490 U.S. 435 (1989)..... 19

U.S. v. Hughes, 585 F.2d 284 (7th Cir., 1978)..... 20

U.S. v. McNinch, 356 U.S. 595 (1958)..... 19

U.S. v. Mead, 426 F.2d 118 (9th Cir., 1970)..... 20

U.S. v. Niefert-White Company, 390 U.S. 228 (1968)..... 19

U.S. ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir., 1991)..... 20

U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1156 (2d Cir.) *cert. denied* 113 S.Ct. 2962 (1993)..... 20

Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992).....13,20,21

Statute, Regulations and Rules

28 U.S.C. §1254(1)..... 2

False Claims Act, 31 U.S.C. §§ 3729, 3730..... 3

U.S. CONST. amend V..... 3

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NORTHERN TELECOM INC.,
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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner, United States *ex rel.* Theodore R. Anderson, requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which was entered in this case on May 25, 1995.

OPINIONS BELOW

The Ninth Circuit's opinion (as amended) is reported at 52 F.3d 810 and is reprinted in the Appendix, beginning at page A1. The opinion of the United States District Court for the Western District of Washington is not reported and is reprinted in the Appendix, beginning at page A14.

JURISDICTION

The Ninth Circuit rendered its judgment in its amended opinion dated May 25, 1995. NTI filed a Petition for Rehearing and Suggestion of Rehearing En Banc on May 4, 1995, following the issuance of the Ninth Circuit's initial opinion on April 20, 1995. Anderson filed a Petition for Rehearing on July 10, 1995. The Ninth Circuit denied NTI's Petition for Rehearing on June 22, 1995 and denied Anderson's Petition for Rehearing as untimely by order entered on July 26, 1995. App., p. A33.

Cross-Petitioner United States *ex rel.* Anderson relies upon Supreme Court Rule 12.3 in filing this Cross-Petition. Anderson received copies of NTI's Petition on September 25, 1995.

This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The text of the material provisions of the current False Claims Act, 31 U.S.C. §§ 3729, 3730 are reprinted in the Appendix, beginning at page A39. The text of the immediately preceding versions of these provisions (prior to October 27, 1986) are reprinted in the Appendix, beginning at page A34.

STATEMENT OF THE CASE

A. Procedural Posture

Anderson filed his complaint alleging violations of the False Claims Act in February, 1990 and served it on Northern Telecom in January, 1992 following several requests to delay service lodged by the United States. Although Anderson alleged violations at dozens of government installations, military and otherwise, the district court limited discovery to just seven military bases and thereafter dismissed all of the claims, six on jurisdictional grounds and one (regarding the Letterkenny Army base) on the merits. The Ninth Circuit Court of Appeals reversed and remanded in part and affirmed in part, holding that the district court had applied the wrong jurisdictional provision to six of the bases, but that it had properly dismissed claims regarding Letterkenny on the merits. NTI previously filed a Petition for Writ of Certiorari with this Court; Anderson now files this Cross-Petition.

B. Anderson's Claim

Anderson, a *qui tam* "whistle blower," contends on behalf of the United States that his former employer, Northern Telecom, sold dozens of costly "SL-100" telecommunications systems to the government knowing at the time it billed the government that the systems could not meet express contractual warranties. Specifically, Anderson claims that the SL-100 systems shared a

defective grounding design that made it impossible for the systems to comply with numerous warranties and specifications, including warranties that the systems complied with the National Electrical Code, met a 10^{-8} "digital bit error rate," were "state of the art" and were free of defects. Anderson claims that NTI continued to sell additional SL-100 systems to the government long after internal memoranda showed that NTI knew that the systems were defective and could not meet contractual warranties and specifications. Letterkenny Army base was one of the government installations at which NTI contracted to install one of its defective SL-100 systems.

C. Facts Material To Issue No. 1

1. The Basis For The District Court's Dismissal Of The Letterkenny Claim, And The Ninth Circuit's Express Rejection Of That Basis

The sole basis for the district court's dismissal of Anderson's Letterkenny claim was an affidavit from Northern Telecom's senior electrical engineer, Murray Gold, in which Gold implied that the Letterkenny switch was of a different type than those installed at the other six litigated bases and that it did not share their grounding design defect. The portion of the district court's opinion dismissing the Letterkenny claim makes no reference to any other basis for the dismissal. App., pp. A24-26.

The Court of Appeals expressly rejected this basis for dismissing the Letterkenny claim, briefly reviewing some of the

evidence Anderson submitted in response to Gold's affidavit and concluding that "the engineer's declaration does not show that the Letterkenny switch had no defects." App., p. A11.

2. The Ninth Circuit's Alternative Findings of Fact

The Court of Appeals offered an alternative basis for dismissal. The Court made a factual finding that NTI did not submit any claims for payment for the Letterkenny system until after NTI had already repaired the switch in March, 1987. App., p.p. A11-12.[1] As a result, the Court reasoned, NTI did not request money from the government until after the Letterkenny system had been brought into compliance with all contractual warranties.

3. The Absence Of Any Opportunity To Submit The Evidence To The Lower Courts

Anderson has never been afforded the opportunity in the Ninth Circuit or the district court to submit evidence or argument responsive to the analysis contained in the Court of Appeals' decision. To the contrary, the Ninth Circuit's analysis of the timing of Letterkenny billing was broached for the first time in the Circuit court opinion; the issue had not been briefed or orally

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[1] For purposes of this Cross-Petition only, Anderson will assume that the Letterkenny system was indeed repaired in March, 1987.

argued at the trial or appellate levels and the district court had not mentioned the issue in its decision. Further, NTI's summary judgment brief in the trial court did not mention the timing of Letterkenny "claims for payment" as a basis for granting its motion. Indeed, while issues regarding switch performance and the existence of a design defect were hotly debated in the trial court briefing, there was essentially no dispute that NTI had submitted numerous claims for payment with regard to the SL-100 at each of the seven litigated bases, including Letterkenny.

4. The Internal NTI Documentary Evidence That The Ninth Circuit's Alternative Findings of Fact are Mistaken

Northern Telecom cannot dispute, however, that the Court of Appeals was mistaken when it found that NTI had not submitted bills, invoices or other claims for payment to the government for the Letterkenny system prior to March, 1987.[2] Northern Telecom submitted claims for payment for the Letterkenny system in 1986, long after knowing of the system's inability to comply with warranties and long before the date the Court of Appeals assumed that the switch was repaired (March,

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[2] Anderson alerts NTI to its obligation under Supreme Court rule 15.1 to inform the Court if the statement in the text is a misstatement of fact.

1987).[3] Attached in the Appendix, at pp. A52-53, is a November 9, 1988 letter from Northern Telecom's senior contracts administrator, S. Diane MacKey, to the commander of the Letterkenny army depot regarding "outstanding DD250's submitted" in which MacKey states:

> A great deal of concern exists over the fact that in some instances DD250's were mailed out requesting signature approval back in 1986 and to date they are still outstanding.[4] (emphasis added)

Also in the Appendix, at pp. A54-[illegible] an April 23, 1986 letter from Northern Telecom program manager, Ronald Tilmon, to the

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[3] All of the referenced documents are authenticated in the declaration under penalty of perjury of attorney Michael R. McCarthy, App., p. A50.

[4] A "DD-250" form is essentially a bill or acknowledgement of debt submitted by NTI to the U.S. Government. Attached in the Appendix, at pp. A57-59, are excerpts from the deposition of Northern Telecom's director of Air Force Programs, Foster Dickson, in which he describes a DD-250 as a document upon which the government's "signature acknowledges that, yes, that milestone has been met" and that thereafter, in reliance upon the DD-250, "the government paying office would issue a check . . . in the amount of whatever was approved on the DD-250." App., p. A59.

commander of Fort Richie Army Base regarding "transmittal of the final test plan for Letterkenny army depot telecommunications system upgrade" which encloses a DD-250 form dated April 24, 1986 in the amount of $14,700. App., p. A56.[5]

D. Facts Material To Issue No. 2

1. The Internal NTI Documentation Of Defects In Its Systems And The Systems' Inability To Meet Contractual Warranties

In opposition to NTI's motion for summary judgment Anderson submitted, among other materials, dozens of internal NTI memoranda. These memoranda revealed that by November, 1984 at the latest NTI had discovered that its SL-100 systems had a defective grounding design that impaired switch performance, violated the National Electrical Code and prevented the systems from meeting key performance specifications, including the digital error rate specification. NTI field engineers reported "serious ground faults" and noted that the grounding defect was present on "every new installation." Grounding design problems, the memoranda state, "dominate our field problem reports" and place NTI "in violation of a safety code which could get us into deeper trouble." Thus, the switches "must be changed to comply [with]...

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[5] Note that the "Bates" numbers across the top of the documents, which were affixed to the documents by NTI, bear consecutive Bates Nos. NDM 799, 800 and 801.

National Electrical Code and other accepted safety guidelines."

An internal NTI "position paper" on the grounding defect summarized the problem. The position paper stated that the grounding design must be revised to comply with the National Electrical Code, to provide a "[]safe electrical path," to "improve[] operational measurements" and to "reduc[e] . . . noise on trunks and lines on the switch." The "main thrust" of the grounding repair "is to rectify the NEC violation that exists on the personal hazard grounds." Finally, the position paper identifies the cause of the grounding defect:

> Multiple NTP system grounding configurations, questionable product design and practices, insufficient design packaging and "DCA" testing not being performed by BNR or NT, no hardware quality control function, incomplete NTI hardware verification, obsolete and dirty design/develop-mental test beds.

Equally startling, in his deposition NTI Vice President Roger Klotz testified that immediately upon becoming Director of Field Quality Control in mid-1984, he concluded that NTI's SL-100 systems violated the National Electrical Code and admitted that a violation of the NEC is a "defect" and that the violation was

present as a result of "design error." He conceded that the technology to remedy the NEC violation was "obviously" available in 1984.

For years after learning of the grounding defect and the SL-100's inability to meet contractual warranties, NTI continued to sell the SL-100 to the United States without disclosing the defect or the warranty breaches. Bill Crawford, second in command of the Air Force's NTI purchasing program, and Tom Crawford (no relation), head of Air Force Quality Assurance, both attested that, despite being in positions in which they should have been informed of these problems, NTI never disclosed that its SL-100 switches violated the NEC and could not meet contractual specifications.

2. Letterkenny's Defective NTI System

In opposition to summary judgment, Anderson presented substantial evidence that the Letterkenny switch shared the same grounding defect present on all other SL-100 switches. NTI memoranda corroborate that the Letterkenny switch required the repair and that the system suffered from the very same performance deficiencies exhibited by the other SL-100s. Indeed, NTI employee Jack Higgins proposed assigning an NTI technician to "babysit" the Letterkenny system during the government acceptance period in order to "get the Army to agree to pay us the $2,000,000 plus for the system." Higgins further stated that NTI needs to "change the grounding" of the Letterkenny switch.

3. NTI's Repair

After several years of documenting the defects and deficiencies in its SL-100 systems, NTI admits that it tried to repair the defective systems. Beginning in 1987, NTI installed a repair known as "isolated system grounding" designed, in NTI's words, to "significantly reduce grounding-related equipment failures," make the switches "consistent with ... National Electrical Code standards" and "virtually eliminate[ ]" a condition known as "ground loops."[6] NTI memoranda state that "product integrity can be greatly enhanced" and "operation... vastly improved" (emphasis in original) if the grounding design defect is corrected. In addition, the repair of the grounding defect resulted in a "marked improvement" in the digital error rate, the specification for which NTI's own testing showed could not previously be met.

Significantly, although NTI has claimed throughout this litigation that there were no design defects in its SL-100, NTI has never satisfactorily explained why it nonetheless repaired the switches or why it did not charge the United States for the repair.

4. The Ninth Circuit Opinion

Although the dispositive rationale for the Ninth Circuit's holding with respect to the Letterkenny system appears to be the

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[6] Anderson's claims relate only to systems installed without the grounding repair.

timing of the billing in relation to the March, 1987 repair, the Ninth Circuit opinion contains more far-reaching implications. The Court cites *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), and explains that the *qui tam* relator "must produce sufficient evidence to support an inference of knowing fraud" and that "common failings of engineers and other scientists are not culpable under the Act" because "the statutory phrase 'known to be false' 'does not mean 'scientifically untrue'; it means 'a lie.'" App., p. A10. After analyzing the timing of the billing, the Court notes that the system did not function properly after installation in March, 1986 and NTI attempted for about a year to correct the defects in order to get paid. App., p. A12. The Court next broadly criticizes Anderson's showing, noting "no evidence" to prove anything other than "the ordinary failings of engineers" and minimizing the importance of the affidavits from Bill Crawford and Tom Crawford. App., p. A12. Finally, the Court reiterates in conclusory terms that "there is no evidence in the record" that NTI knowingly presented a false or fraudulent claim. App., p. A13.

REASONS FOR GRANTING THE WRIT

I.

THE COURTS OF APPEALS NEED CLEAR INSTRUCTION REGARDING THE LIMITS OF THEIR POWER TO AFFIRM SUMMARY JUDGMENTS ON ALTERNATIVE BASES.

Anderson requests that this Court grant certiorari in order to correct the Ninth Circuit Court of Appeals' departure from the accepted and usual course of judicial proceedings and to instruct the courts of appeals that they may not affirm a summary judgment on alternative findings of fact as to which the appellant has never had fair opportunity to submit responsive evidence or argument.

In *Fountain v. Filson*, 337 U.S. 921 (1949) and *Singleton v. Wulff*, 428 U.S. 106 (1976) this Court placed limitations upon the power of the courts of appeals to enter judgments against appellees who had not previously been required to defend against a summary judgment motion by the appellant. In *Fountain* the defendants moved for and were granted summary judgment. On appeal the Court of Appeals reversed and granted judgment in favor of the plaintiffs, despite that plaintiffs had never moved for summary judgment. This Court reversed, holding that the Court of Appeals had deprived the defendants "of an opportunity to dispute the facts material to [the] claim." *Fountain, supra,* at 756. In *Singleton* plaintiff physicians challenged the constitutionality of a Missouri abortion statute, and defendants successfully moved to dismiss on the grounds that plaintiffs lacked standing. The Eighth Circuit Court of Appeals reversed, holding that the

plaintiffs had standing, and granted the relief requested by plaintiffs on the constitutionality question, notwithstanding that plaintiffs had never moved for summary judgment. Again, although this Court affirmed the Eighth Circuit's holding regarding standing, it reversed the circuit court's decision on the constitutionality question, stating:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. [Citations omitted] ... This is "essential in order that the parties may have the opportunity to offer all the evidence they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence."

Singleton, supra, 428 U.S. at 120 quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

However, this Court has never made clear that under appropriate circumstances non-moving appellants are entitled to a similar opportunity to present evidence and argument, even where the Court of Appeals is affirming a summary judgment. Indeed, the *Singleton* Court stated that it "announce[d] no general rule" regarding "what questions may be taken up and resolved for the first time on appeal." *Singleton, supra,* 428 U.S. at 121.

As a consequence, while the Courts of Appeals universally acknowledge that they may affirm a summary judgment on a

ground not relied upon by the trial court, they articulate materially different limits upon this power. The Eighth Circuit uses the power broadly. For example, in *Katter v. Arkansas Louisiana Gas Co.*, 765 F.2d 730 (8th Cir., 1985) the district court granted summary judgment to the defendants because plaintiffs' suit was equitable in nature and was barred by the doctrine of laches. The Eighth Circuit found that doctrine to be completely inapplicable, but affirmed on an alternative ground, stating "[w]e may... affirm on any ground supported by the record, even though that ground was not directly addressed (or, in fact, addressed at all) in the court below." *Id.*, 765 F.2d at 734-5. The *Katter* court then disposed of the case under a section of the Restatement of Judgments not cited below that required that the appellate court make findings regarding "manifest[ations] [of] intent" by the plaintiffs. *See also, Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir., 1990) ("we are, of course, free to affirm ... 'on any ground supported by the record even if the issue was not pleaded, tried or otherwise referred to in the proceedings below'"). At the opposite end of the spectrum is the Seventh Circuit, which more than once has noted that appellate courts should not affirm summary judgments on alternative bases unless the non-moving party has had fair opportunity to respond. The Seventh Circuit has stated:

> True, we may affirm a summary judgment on any ground that finds support in the record, [citations omitted], but the grounds must have been adequately presented in the trial court so that the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue. [Citations omitted]

Box v. A&P Tea Co., 772 F.2d 1372, 1376 (7th Cir., 1985) *cert. denied* 478 U.S. 1010 (1986); *see also, Patz v. St. Paul Fire and Marine Insurance Co.*, 15 F.3d 699, 703 (7th Cir., 1994) (if appellant has "had no occasion to contest [the issue], [he] would be unfairly surprised by a decision based upon it"). Other circuit courts come down in the middle and/or are inconsistent. In *Paskaly v. Seale*, 506 F.2d 1209, 1211 (9th Cir., 1974) the Ninth Circuit instructed that affirmance on another ground is appropriate "provided the parties have had the opportunity to discuss it in their briefs in this court," rather than to present responsive evidence in the court below.[7] *See also, Griffith v. State of Colorado*, 17 F.3d 1323, 1328 (10th Cir., 1994) (requiring "adequate opportunity to develop the record on the issue"); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1361 (D.C. Cir., 1982) (appellate courts should "rarely" affirm on alternative theories, citing *Fountain v. Filson, supra*); *Heirs of Fruge v. Blood Services*, 506 F.2d 841, 844 (5th Cir., 1975) (non-moving party must be afforded opportunity to "dispute facts material to [new basis for decision]").

This case provides the Court with the opportunity to make clear for the first time that there are limits upon an appellate court's ability to affirm a summary judgment on an alternate basis not advanced in the district or appellate court nor relied upon in the district court disposition. The issue of the timing of the billing on the Letterkenny switch, which became the sole basis for the Ninth Circuit's affirmance of the district court's summary

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[7] Other Ninth Circuit cases state the principle more broadly. *See, e.g., Fidelity Financial Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1437 (9th Cir., 1986) *cert. denied* 479 U.S. 1064 (1987) ("we may affirm ... on a ground not selected by the district judge so long as the record fairly supports such an alternative disposition of the issue").

judgment, had never been broached by NTI in the trial court, was not relied upon by the district court in its opinion and was neither briefed nor orally argued in the Ninth Circuit. Indeed, the Ninth Circuit's disposition on this ground came as an unhappy surprise to Anderson (and, presumably, a happy one to NTI). Thus, Anderson was deprived of a fair opportunity to contest the factual findings and legal analysis contained in the appellate court opinion. As the Statement of the Case and the attachments in the Appendix make clear, had he been provided the opportunity, he would successfully have raised an issue of fact regarding whether NTI submitted bills to the government for the Letterkenny switch prior to the alleged repair in March, 1987. By taking certiorari on this issue the Court can simultaneously correct the Ninth Circuit's departure from the accepted and usual course of judicial proceedings and, by giving clear instructions to the courts of appeals, eliminate inconsistency among them regarding the limits of their power to affirm summary judgments on alternative bases.

II.

THIS COURT HAS NEVER DIRECTLY ADDRESSED PRECISELY WHAT CONDUCT VIOLATES THE FALSE CLAIMS ACT AND, AS A CONSEQUENCE, THE LOWER COURTS ARE CONFUSED WITH RESPECT TO IMPORTANT ELEMENTS OF THE OFFENSE.

Although this Court has disposed of a number of discrete issues related to the application of the False Claims Act, it has never directly discussed the precise elements of the offense under the current or immediately preceding versions of the Act, including the requisite level of scienter. The issues directly addressed by this Court include whether predecessor statutes to the FCA which prohibit defrauding the "United States" apply to

particular entities, *see, e.g., Rainwater v. U.S.*, 356 U.S. 590 (1958) (Commodity Credit Corporation covered); *Tanner v. U.S.*, 483 U.S. 107 (1987) (mere recipient of federal funds not covered), whether civil penalties under the FCA and predecessor statutes can under particular circumstances violate constitutional protections against double jeopardy, *see, e.g., U.S. v. Halper*, 490 U.S. 435 (1989); *Rex Trailer Company v. U.S.*, 350 U.S. 148 (1956), and whether particular submissions to the government constitute "claims" for purposes of applying the FCA and its predecessors, *see, e.g., U.S. v. Niefert-White Company*, 390 U.S. 228 (1968) (applications for government loans are "claims"); *U.S. v. McNinch*, 356 U.S. 595 (1958) (applications for credit insurance are not "claims"). In none of these cases, however, was it necessary for this Court to apply the Act's scienter provisions to a particular course of conduct.

In particular, while this Court has explained the appropriate calculation of damages and penalties against a defendant held liable for having sold goods to the government it knew could not meet contractual warranties, the Court did not have occasion in that case to address the underlying question of liability for those sales. The defendant in *U.S. v. Bornstein*, 423 U.S. 303 (1976) was found liable under the FCA for selling radio kits to the government which it falsely labeled as having met contractual specifications. While in the course of disposing of the damages issues the *Bornstein* Court appeared to assume that a defendant could properly be found liable for the violation alleged, the Court did not have occasion to address that issue.

As a consequence, the lower courts exhibit confusion regarding the application of key elements of the Act. For example, some holdings indicate that a defendant cannot be liable under the FCA if government representatives knew that the claims for payment were false. *See, e.g., Boisjoly v. Morton Thiokol, Inc.*,

706 F. Supp. 795, 808-810 (D. Utah, 1988) (dismissal granted because "NASA knew of the alleged affects") citing *U.S. v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir., 1966) (government representatives' knowledge of falsity estops the government's FCA claim). Other courts expressly reject this principle, stating "that relevant government officials know of the falsity is not in itself a defense." *U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1156 (2d Cir.) *cert. denied* 113 S.Ct. 2962 (1993) quoting *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir., 1991). Similarly, the circuit courts are in conflict with respect to whether specific intent to defraud is a required element of an FCA offense under the immediately preceding version of the Act.[8] *Compare, U.S. v. Mead*, 426 F.2d 118 (9th Cir., 1970) (specific intent to defraud required) *and U.S. v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir., 1972) (specific intent to defraud required) *with U.S. v. Hughes*, 585 F.2d 284 (7th Cir., 1978) (specific intent to defraud not required) *and U.S. v. Cooperative Grain and Supply Co.*, 476 F.2d 47 (8th Cir., 1973) (specific intent to defraud not required).

By correcting the Ninth Circuit's misunderstanding of the elements of an FCA claim and its misapplication of those elements to the facts of this case, the Court can authoritatively delineate the precise elements of the claim and eliminate continuing confusion among the lower courts. The Circuit Court's citation of *Wang, supra*, its discussion of NTI's efforts to diagnose and correct defects in the Letterkenny switch and its reference to the "common failings of engineers and other scientists" implies an inaccurate

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[8] Although the 1986 amendments to the Act disposed of this issue, the trial court in this case may rule on remand that the pre-1986 law applies to claims for payment submitted before the amendments' effective date.

view of the elements of an FCA claim that, left uncorrected, will drain the FCA of all potential for combatting fraud by government contractors. Unlike the relator in *Wang,* Anderson has submitted voluminous internal NTI documentation showing that NTI knew in 1984 that its grounding design was defective, that performance was impaired and that its SL-100 switches could not meet express contractual warranties. Nonetheless, long after learning these facts NTI continued to market its switches to the government and sell those switches on the basis of the very same undiluted warranties, without disclosing that the switches had defects that prevented compliance with the warranties. As to each of these switches, including Letterkenny, it is undisputed that NTI submitted numerous interim billings, or "claims for payment," on the basis of the very warranties it already knew the switches did not and could not meet. Each time NTI submitted an invoice on the Letterkenny switch knowing that the switch could not meet express contractual warranties (or acting in deliberate ignorance or reckless disregard of the truth) it violated the Act, regardless of its scrambling, however energetic, to diagnose and correct the defects. By contrast, the *Wang* relator's only evidence in support of his claims consisted of his personal criticism of the defendants' engineering work as "low quality" and "faulty." By repeatedly stating, on these facts, that Anderson had "no evidence" of false claims and stating that this case typifies the type of common but innocent "failings of engineers" discussed in *Wang* the Ninth Circuit has ignored the statutory elements of an FCA claim and postulated entirely new burdens upon the government and defenses for the accused.

The Ninth Circuit's vague criticism of affidavits submitted by "two people who worked on telecommunications purchases at different military bases", at p. A12, likewise misconstrues the record and the government's burden on an FCA claim. There is no evidence in the record that NTI ever disclosed to the government

that the Letterkenny switch was defective and could not meet contractual warranties. Further, as some lower courts have explained and this Court should confirm, the defendant's disclosure of the falsity of its billings to a government representative constitutes at most probative evidence of whether the defendant has "knowingly" submitted false claims for payment. It is not a defense in itself, nor an element of the government's prima facia case.

CONCLUSION

For the reasons stated above, Anderson's Cross-Petition for Writ of Certiorari should be granted.

October 25, 1995

Respectfully submitted,

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APPENDIX

CONTENTS

Ninth Circuit Amended Opinion and Judgment Issued May 26, 1995 (reported at 52 F.3d 810 (9th Cir. 1995)) A1

District Court Order Granting Motion for Summary Judgment [entered April 23, 1993]..... A14

District Court Judgment Issued April 23, 1993 ..... A29

Ninth Circuit Order Issued June 22, 1995 Denying Northern Telecom's Timely Petition for Rehearing A31

Ninth Circuit Order Issued July 26, 1995 Denying Anderson's Untimely Petition for Rehearing A33

Text of the False Claims Act before October 27, 1986, 31 U.S.C. §§ 3729-3731 (1982) A34

Text of 31 U.S.C. § 3729 False Claims A39

Text of 31 U.S.C. § 3730 Civil Actions for False Claims A42

Declaration Under Penalty of Perjury of Michael R. McCarthy (and Accompanying Deposition Excerpts and Documents from NTI's files) A50

UNITED STATES of AMERICA ex rel.
THEODORE R ANDERSON,
Plaintiff-Appellant,
v.
NORTHERN TELECOM, INC.,
Defendant-Appellee.

No. 93-35520.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1994.
Decided April 20, 1995.
As Amended May 26, 1995.

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OPINION

Appeal from the United States District Court for the Western District of Washington.

Before: ALARCON, BEEZER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

The district court dismissed most of the *qui tam* claims in this case for lack of subject matter jurisdiction, on the ground that the 1986 amendment to the False Claims Act did not apply retroactively. One claim was dismissed on summary judgment, because the plaintiff did not establish a prima facie case of fraud. We conclude that the retroactivity analysis was mistaken, because the relevant conduct took place after the effective date of the amendment. We agree, however, that no prima facie case of fraud was made out on the claim dismissed on summary judgment.

I. Facts

Northern Telecom sells digital telecommunications switching systems, called "switches," worth about $2 million each to the military. The gist of Mr. Anderson's claims is that Northern Telecom knew the switches were defective, but tried to palm them off on the government.

All the switches in this case were delivered, invoiced and paid for before 1986, except for one switch at Letterkenny Army Depot. The False Claims Act was amended in 1986 in a way that changed the consequences if the relator told the government about the fraudulent claim before bringing suit. Mr. Anderson left Northern Telecom's employ. In 1988, he told the FBI about Northern Telecom's allegedly fraudulent practices. The United States investigated, and then chose not to pursue the claim. In 1990, Mr. Anderson sued under the *qui tam* provisions of the False Claims Act. The government chose not to intervene.

The district court dismissed the claims based on the switches sold and paid for before 1986, on the ground that the 1986 amendments to the False Claims Act applied prospectively

to false claims made after the date of the

amendment. Because Northern Telecom had submitted its allegedly false claims before 1986, the district court applied the pre-1986 law. Under the old law, Mr. Anderson's report to the FBI would have precluded his subsequent *qui tam* lawsuit.

The Letterkenny Army Depot switch was paid for after 1986, so the district court applied the new law. The court granted summary judgment for Northern Telecom on this switch, because Mr. Anderson had no evidence of fraud.

II. Analysis

We have jurisdiction over the district court's final judgment under 28 U.S.C. § 1291. We review the district court's grant of summary judgment and its statutory interpretation *de novo*. *Dowling v. Davis*, 19 F.3d 445, 447 (9th Cir. 1994).

The False Claims Act enables a private individual to sue a firm which presents a fraudulent claim to the government. The action is brought in the name of the government, and is served on the government. The government can take over prosecution, which affects the size of the bounty the relator gets if the action succeeds. 31 U.S.C. § 3730. Before 1986, if the government did not elect to proceed with the action itself, the court had to dismiss the action if it was based on evidence the government already had when the lawsuit was filed:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C.§3730(b)(4) (1982).

If this old law applies, then Mr. Anderson's *qui tam* action as to Northern Telecom's alleged pre-1986 false claims was properly dismissed, because "the action is based on evidence or information the Government had when the action was brought." Although the only reason the government had the information in 1990, when the action was brought, is that Mr. Anderson informed the FBI in 1988, the pre-1986 statutory bar operated even though the relator himself was the source of the information. *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669 (9th Cir. 1978).

Congress changed the law in 1986. The old language barring recovery if the government had "information" before suit was filed was changed to an entirely new scheme, in which recovery was barred if the claim was based on "public disclosure," unless the relator was "an original source of the information." Here is the new statutory language at (e)(4), which entirely replaces the old subsection (b)(4) quoted above:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and

> independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (1988) (emphasis added).

Under this new provision, "public disclosure" rather than "information the Government had" bars the claim. *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). The claim is saved, despite "public disclosure," if the relator "is an original source." That means that the relator (1) has "direct and independent knowledge of the information on which his allegation is based," and (2) "has voluntarily provided the information to the Government before filing" his *qui tam* action. *Wang*, 975 F.2d at 1417, citing 31 U.S.C. § 3730(e)(4)(B). The relator does not have to prove that he is an "original source" unless there has been "public disclosure." *Id.*, citing 31 U.S.C. § 3730(e)(4)(A); *Hagood*, 929 F.2d at 1420.

The district court decided in the case at bar that the old law applied. The only analysis done was of whether "the action is based on evidence or information the Government had when the action was brought." No analysis was performed under the "public disclosure" and "original source" scheme of the new law, and the briefs do not discuss how the new law would apply to the evidence. Because we conclude that the new law should have been applied, we remand so that the district court can perform the analysis under it.

A. ***Retroactivity.***

Statutes ordinarily do not operate retroactively, that is, to change the legal consequences of past conduct. An application is retroactive if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994).

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 114 S. Ct. at 1505, emphasis added. *See also, Murphy v. FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (en banc).

In *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), we applied the 1986 amendment to a case brought after 1986, where the disclosure to the government was made prior to 1986. We held that there was no "public disclosure" to serve as a bar to jurisdiction under 31

U.S.C. § 3730(e)(4)(A), so it did not matter whether the relator was an "original source" under § 3730(e)(4)(B). *See also, Wang*, 975 F.2d at 1416. Although this appears to be a retroactive application of the 1986 amendment, we did not consider, discuss or decide the retroactivity issue in *Hagood*. The case came down before Landgraf, and the retroactivity issue was not raised by the parties.

The Sixth Circuit has held that the 1986 amendments to the False Claims Act do not apply retroactively. *United States v. TRW, Inc.*, 4 F.3d 417, 423 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994); *United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991). FEW (not Murphy) addressed the amendment at issue in this case. In FEW, the relator disclosed the false claim before the 1986 amendment saved him from the jurisdictional bar, while in the present case, the relator did not make his disclosure until after the amendment expanded jurisdiction. In the case at bar we do not reach the question of whether the amendment applies retroactively. We assume without deciding that the amendment is prospective in its effect, as the Sixth Circuit held.

The issue is, prospective to what? The Supreme Court has taught that the proper focus of retroactivity analysis is the conduct that would be affected by the law. Landgraf, 114 S. Ct. at 1505. Retroactive application of a law means that it changes the legal consequences of conduct that took place before the law went into effect. If, however, the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively. That is, so long as Congress establishes the legal consequences of conduct prior to the conduct taking place, there is no issue of retroactivity. Congress presumptively tells people what to do in the future, but absent clear congressional intent, does not change the legal consequences of what they have done before it spoke. Landgraf,

114 S. Ct. at 1505.

In the case at bar, Northern Telecom submitted the allegedly false claims before the 1986 amendment became effective. But the 1986 amendment did not change the legal consequences of Northern Telecom's conduct. If Northern Telecom really did submit a fraudulent claim, it became liable and remained liable to the government and to potential *qui tam* relators. Congress changed the consequences of Mr. Anderson's conduct, not Northern Telecom's, in 1986. Had Mr. Anderson gone to the FBI with his information before the 1986 amendment, his subsequent claim would have been barred by his own disclosure. Pettis, 577 F.2d at 669. After the amendment, his disclosure to the FBI did not bar his claim. Because Mr. Anderson acted after the amendment, and the amendment changed the consequences only of his conduct, application of the amendment to his conduct is prospective, not retroactive. *Cf. McGinnis v. Kentucky Fried Chicken of California*, 42 F.3d 1273, 1275 (9th Cir. 1994) (vacating punitive damages award because, although statute authorized punitive damages at the time of trial, it did not authorize them at the time KFC engaged in the wrongful conduct for which the punitive damages were awarded). Whether the amendment is retroactive or prospective only, Mr. Anderson's conduct took place after it, so benefited from the new law.

We conclude that the district court erred in dismissing Mr. Anderson's claims for lack of subject matter jurisdiction in reliance on the pre-1986 version of the False Claims Act. We remand the case so that the district court may decide upon the claims under the amended version of the Act.

B. ***Was summary judgment proper on the Letterkenny switch?***

The only switch as to which the district court reached the merits of the dispute was the one sold to Letterkenny Army Depot. Northern Telecom sent invoices to the Army for this switch in 1987 and 1989. Although the district court decided which law applied on the basis of when the claims were paid, we need not reach the question of whether the invoice date, the acceptance date or the payment date controls, because all dates relevant to the Letterkenny switch occurred after the 1986 law became effective.

The district court granted summary judgment in favor of Northern Telecom, because Mr. Anderson failed to establish a genuine issue of material fact as to whether Northern Telecom submitted a false claim in violation of the statute. We review *de novo*, *Dowsing*, 19 F.3d at 447, and affirm.

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims...." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). It is "not a disfavored procedural shortcut," but has replaced pre-1938 devices as the "principal tool] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

> The judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of

> evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. If the facts make a claim "implausible," the non-movant must present "more persuasive evidence than would otherwise be necessary" in order to defeat a summary judgment motion. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). Although the evidence must be viewed in a light most favorable to the opponent of the motion, and all reasonable inferences must be drawn in his favor, the inferences are limited to those upon which a reasonable jury might return a verdict. *T.W. Elec. Svc., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud. *Wang* , 975 F.2d at 1420. "The requisite intent is the knowing presentation of what is known to be false," as opposed to innocent mistake or mere negligence. *Hagood*, 929 F.2d at 1421. "Bad math is no fraud," proof of mistakes "is not evidence that one is a cheat," and "the common failings of engineers and other scientists are not culpable under the Act." *Wang* , 975 F.2d at 1420-21. The statutory phrase "known to be false" "does not mean 'scientifically untrue'; it means 'a lie.'" *Id.* at 1421.

The gist of Mr. Anderson's claim is that all the switches to which his lawsuit refers lacked proper grounding, so they would not work properly, and could be dangerous if certain parts were touched at certain times. The grounding on a number of switches was changed by a later enhancement, after deficiencies in performance were discovered. Grounding the switch better

apparently reduced noise and hum, reduced the error rate in transmissions of digital data, and gave better protection and isolation to switch components.

Northern Telecom's senior electrical engineer on the project stated in his declaration that the Letterkenny switch was different from the others, and had the new grounding feature built in from the beginning. Mr. Anderson's evidence included a Northern Telecom internal document called "1987 Enhanced Grounding Schedule" which showed that something was planned for the Letterkenny switch in March 1987. Northern Telecom's engineer explained in his declaration that this was not the same grounding fix as was
needed on the older switches, but was a different and simpler change.

The engineer's declaration does not show that the Letterkenny switch had no defects. But Mr. Anderson's proof does not show any knowing presentation of a false or fraudulent claim. All it shows is that Northern Telecom's engineers built a switch that was not satisfactory, and after installing it, they fixed it. Regardless of whether presentation of a claim for payment for the inadequately grounded switch would have been a violation of the statute, the evidence does not show any such presentation. These are the relevant dates:

Northern Telecom installs the Letterkenny switch--March 1986

Northern Telecom fixes the ground--March 1987

Army accepts the switch--October 1987, August 1989

Northern Telecom bills Army--November 1987, August 1989

Army pays Northern Telecom--December 1987, September 1989.

Basically, the switch was installed, it had bugs, the bugs were fixed, and then the vendor billed the Army and was paid. The Army and Northern Telecom discovered the problems in the switch when it was put into service in March of 1986. At that point, Northern Telecom began a year and a half of work to bring this and other switches up to a level of performance satisfactory to the Army. An October 31, 1986 Northern Telecom internal memorandum says "[t]he Letterkenny switch was cutover (in service) on March 14, 1986 with deficiencies," and "[s]ince that time, we have been endeavoring to get the issues resolved ... such that we can accomplish the ... acceptance test and get the Army to agree to pay us." However, it took a long time to figure out whether the hum on the line was caused by fluorescent lights, the AC power supply, dirt, installation error, some aspect of the switches, or any number of other possibilities, and to figure out what to do about it.

Mr. Anderson offered no evidence to prove the contrary. He used the same materials outlined above to show that when the Letterkenny switch was installed, it was not as good as it should have been. But the *qui tam* action does not lie for the ordinary failings of engineers. It requires knowing presentation of a false or fraudulent claim. Mr. Anderson submitted affidavits of two people who worked on telecommunications purchases at different military bases, not Letterkenny Army Depot. Their bases received switches different from the Letterkenny switch. One said the Air Force "usually approved Northern Telecom's proposed testing procedures." The other said "if [Anderson's] allegations are true, I believe I should have been told." This evidence does not establish a genuine issue as to whether Northern Telecom knowingly presented a false claim for the Letterkenny Army Depot switch.

There is no direct evidence, and no evidence from which a jury could reasonably draw an inference, that Northern Telecom knowingly presented a false or fraudulent claim to the Army for the Letterkenny switch. There is evidence that, when installed, the Letterkenny switch did not work properly. But no reasonable jury could draw an inference of presentation of a false or fraudulent claim from that. The Army knew the switch was unsatisfactory, and expressed its dissatisfaction. There is no evidence in the record that Northern Telecom knowingly presented a false or fraudulent claim for the switch.

III. Conclusion

We reverse the district court's dismissal of Mr. Anderson's claims based on his disclosure to the FBI, and remand for further proceedings under the 1986 amendment. We affirm the district court's grant of summary judgment as to the Letterkenny Army Depot switch. The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *Ex Rel.*, THEODORE R. ANDERSON, Plaintiff, v. NORTHERN TELECOM, INC., Defendant.	NO. C90-231R ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [ENTERED APRIL 23, 1993]

THIS MATTER comes before the court on defendant's motion for summary judgment. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

Theodore Anderson brings this action against defendant Northern Telecom, Inc. ("Northern Telecom") on behalf of the United States pursuant to the False Claims Act's *qui tam* provision. 31 U.S.C. § 3730. Mr. Anderson alleges that Northern Telecom submitted false claims to the Government in connection with its sale of digital telecommunications switches ("switches") to various military bases. Mr. Anderson generally alleges that

Northern Telecom violated its contracts with the Government when its switches did not conform to contract specifications due to grounding problems.

Northern Telecom now moves for summary judgment on the following grounds: First, Northern Telecom contends that this court lacks subject matter jurisdiction under the False Claims Act. Second, Northern Telecom denies any breach of contract with respect to switches supplied to military bases. Third, Northern Telecom alleges that Mr. Anderson has failed to raise a genuine issue regarding performance problems of Northern Telecom's switches. Finally, Northern Telecom contends that the False Claims Act is unconstitutional as applied to this *qui tam* action. The court addresses each issue in turn below.

II. DISCUSSION

A. Standard of Review on Summary Judgment.

On a motion for summary judgment, this court will look at the evidence in the light most favorable to the non-moving party, and determine whether there are any genuine issues of material fact which would require a jury or judge to resolve the parties' differing versions of the truth at trial. *Sierra Club v. Penfold*, 857 F.2d 1307, 1320 (9th Cir. 1988). If the non-moving party will bear the burden of proof at trial on an essential element of its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact as to that element, then summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Moreover, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Jurisdiction under the False Claims Act.

The False Claims Act was most recently amended in 1986. 31 U.S.C. §§ 3729-3731. That section of the amended statute which is at issue here concerns the court's *qui tam* jurisdiction. 31 U.S.C. § 3730(e)(4)(A). This section, as amended, provides in relevant part:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations . . . in a hearing . . . or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added).

Under the pre-amended False Claims Act, an informer with direct knowledge of the fraud who reported the information to the government or to the news media prior to filing suit would have been jurisdictionally barred from bringing suit. *See, United States ex rel. Wisconsin Dept. of Health and Social Services v. Dean*, 729 F.2d 1100, 1105 (7th Cir. 1984) (holding that federal courts are without subject matter jurisdiction where the suit is based upon information in the possession of the government at the time the suit was brought). The amendment of this section, by removing in part this jurisdictional bar, was intended to "encourage more private enforcement of suits." *United States ex rel. La Valley v. First National Bank*, 707 F. Supp. 1351, 1355 (D. Mass. 1988) (quoting S. Rep. 345 at 23-24, 99th Cong., 2nd Sess. 4, reprinted in 1986 U.S. Code Cong. & Admin. News pp. 5266, 5269).

The issue before the court is whether the 1986 jurisdictional amendment applies retroactively to the allegedly

pre-amendment conduct giving rise to this action.[1]

1. *Retroactive Versus Prospective Presumption.*

The Supreme Court has articulated apparently inconsistent presumptions regarding the applicability of new enactments to pending cases (or, as in this case, to litigation begun post-enactment that concerns pre-enactment events). In *Bradley v. School Board*, 416 U.S. 696, 711 (1974), the Court held that "a Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. "

Later, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), the Court held, without reference to its prior holding in *Bradley*, that: "retroactivity is not favored in the law... Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Even three years prior to *Bowen*, the Court had qualified *Bradley*, and reasoned that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect. " *Bennett v. New Jersey*, 470 U.S. 632, 638-39 (1985) (declining to give retroactive application to changes under Title I to the substantive requirements for federal grants).

Then in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), the Court noted that its views on retroactivity expressed in *Bradley* and *Bowen* were in "apparent

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[1] The parties dispute whether all the conduct at issue occurred prior to the 1986 Amendments. The court addresses this issue below.

tension." The Court did not, however, resolve this tension in *Kaiser Aluminum* because it found that under either the *Bradley* or *Bowen* presumption, "where congressional intent is clear, it governs." Finding a clear congressional intent that the statute at issue was to be applied prospectively, the Court declined to reconcile *Bradley* and *Bowen*.

Despite the many differences in reasoning and results among courts that have considered the retroactivity of the 1986 Amendments to the Fair Claims Act, there is complete agreement that neither its plain language nor its legislative history provide any guidance on whether the Amendments were intended to be applied prospectively or retroactively. *See, es, United States ex rel. McCoy v. California Medical Review. Inc.*, 723 F. Supp. 1363, 1367 (N.D. Cal. 1989); *United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991); *United States ex rel. La Valley v. First National Bank*, 707 F. Supp. 1351, 1359 (D. Mass. 1988).

Thus, without the guidance of legislative intent and against this backdrop of conflicting Supreme Court precedent, this court must look to the Ninth Circuit for direction. Compare *Estate of Reynolds v. Martins,* 61 U.S.L.W. 2488 (9th Cir. Feb. 9, 1993) (No. 91-15237) (declining to address the conflict between *Bradley* and *Bowan* [sic], but rather holding that the plain language of the Civil Rights Act of 1991 dictates retroactive application of the Act).

2. *Ninth Circuit Treatment of Retroactivity.*

In 1985, the Ninth Circuit noted that the *Bradley* presumption of retroactivity applied equally to "changes in the law that affect jurisdiction." In re Rubin, 769 F.2d 611, 614 (9th Cir. 1985). In 1989, after the Supreme Court's decision in *Bowen*, the Ninth Circuit considered whether a provision of the Judicial

Improvements and Access to Justice Act of 1988, which expanded the court's jurisdiction upon removal of a case under the Act, should be applied retroactively. *Kruso v. International Telephone & Telegraph Corp*, 872 F.2d 1416, 1424 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990).

The court noted the lack of clear congressional intent, and then considered whether the jurisdictional provision was "addressed to remedies or procedures... [or whether it] otherwise alter[ed] substantive rights." *Id.*, (quoting *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985)). Finding that the expansion of the court's removal jurisdiction was a "procedural enactment which [did] not alter substantive rights," the Ninth Circuit applied the *Bradley* presumption, and held that the enactment applied retroactively. *Kruso*, 872 F.2d at 1425.

The Ninth Circuit applied this analysis again in *Delta Computer Corp. v. Samsung Semiconductor & Telecommunications Co.*, 879 F.2d 662, 663 (9th Cir. 1989). In Delta, the Ninth Circuit held that an amended section of the Federal Arbitration Act applied retroactively to limit its jurisdiction to hear an interlocutory appeal of an order compelling arbitration. The court found that the amendment's limitation of its appellate jurisdiction did "not infringe upon or deprive [the parties] of any mature or unconditional right." *Id.* at 664.

Thus, the Ninth Circuit directs that the *Bradley* presumption of retroactivity applies only "when a statute is addressed to remedies and procedures and does not otherwise alter substantive rights." *Lee v. Sullivan*, 787 F. Supp. 921, 931 (N.D. Cal. 1992) (quoting *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985)).

3. Application of the Ninth Circuit's "Substantive Rights "

Test to the 1986 Amendments to the False Claims Act.

Defendant Northern Telecom cites *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991) for the proposition that the 1986 Amendments affect substantive rights, and should not therefore be subject to the *Bradley* presumption of retroactivity. *Murphy* considered the 1986 Amendment that changed the definition of "knowingly" within the statute, thereby subjecting to liability conduct which the Sixth Circuit would not have previously viewed as violating the Act; and also considered the Amendment that increased the potential liability of the defendant in that case by more than $1,000,000. 937 F.2d at 1036, 1038.

Reasoning that "the phrase 'substantive rights and liabilities' must be construed broadly," *Murphy* held that the 1986 Amendments affected the defendant's substantive rights by enlarging the scope of his potential liability. *Id.* at 1038.

Murphy, as the only Court of Appeals decision considering retroactivity of the 1986 False Claims Act Amendments, is entitled to substantial weight. *See, United States ex rel. Hartigan v. Palumbo Bros. Inc.*, 797 F. Supp. 624, 628-629 (N.D. III. 1992) (holding that the 1986 Amendments have only prospective application under *Murphy*). *Hartigan* squarely addressed the question of whether the jurisdictional amendment to the False Claims Act should be given retroactive application, and applied a similar "substantive rights" analysis adopted by the Seventh Circuit. 797 F. Supp. at 628 (citing *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929, 936-37 (7th Cir. 1992) (holding that the *Bowen* presumption of prospective application controls where the amendments involved "substantive provisions" of the statute)). *Hartigan*, following *Murphy*, concluded that the 1986 jurisdictional amendment affected the

"substantive rights" of the defendant, and should only be applied prospectively. 797 F. Supp. at 629.

Applying the Ninth Circuit's "substantive rights" test, this court also concludes that *Murphy* must control in this instance. The jurisdictional amendment at issue, 31 U.S.C. § 3730(e)(4), is not limited to purely procedural considerations such as the timing of appellate review at issue in Delta, 879 F.2d at 663; or, whether naming "John Doe" defendants defeats diversity jurisdiction for the purposes of removal at issue in *Kruso*, 872 F.2d at 1424. These cases exemplify the kind of "procedural enactment" intended to be given retroactive effect under the Ninth Circuit's "substantial rights" test.[2]

In contrast, the jurisdictional amendment at issue here broadens the scope of defendant's exposure to liability, by permitting claims that would have been precluded under the False

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[2] Similarly, Mr. Anderson's reliance on *Federal Deposit Ins. Corp. v. New Hampshire Ins. Co.*, 953 F.2d 478, 485 (9th Cir. 1991) also supports this reasoning. In New Hampshire, the Ninth Circuit considered whether to apply retroactively the amended statute of limitations period in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. ñ 1821(d)(14)(A)(i). The court found no clear indication of congressional intent, and so looked to whether the amendment was "procedural in nature" or whether it would "affect substantive rights." New Hampshire, 953 F.2d at 487. Concluding that a statute of limitations period is typically considered to be procedural in nature, the court held that the amendment must be accorded retroactive effect. *Id.* The jurisdictional amendment at issue here, unlike an amendment to a statute of limitations, is not typically presumed procedural.

Claims Act prior to its amendment in 1986. This follows precisely the reasoning of the *Murphy* court, which held that the 1986 Amendments must be applied prospectively only because they "create a new liability in connection with a past transaction." 937 F.2d at 1038 (quoting *United States v. Bekhrad*, 672 F. Supp. 1529, 1530 (S.D. Iowa 1987)). The court therefore holds that the 1986 Amendments to the False Claims Act have only prospective effect, and will not be applied to claims that were completed before October 27, 1986, the date on which the Amendments took effect.[3]

4. *Date Claims Completed.*

A "claim" under the False Claims Act is not "completed" until the Government has paid the amount due. United States ex red *Hartigan v. Palumbo Bros. Inc.*, 797 F. Supp. 624, 629 (N.D. Ill. 1992) ("a claim is not complete before the 'last date when the Government paid any money on a particular claim'") (quoting *United States v. Klein*, 230 F. Supp. 426, 442 (W.D Pa. 1964), aCd, 356 F.2d 983 (3rd Cir. 1966)); *see also, Blusal Meats. Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (holding that the six-year limitations period under the False Claims Act begins to run on the claim's date of payment); and, *United States ex rel. Duvall v. Scott Aviation*, 733 F. Supp. 159, 161 (W.D.N.Y.

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[3] The court does not find persuasive Mr. Anderson's citation of *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). Although some of the conduct at issue in the case had occurred in 1982, and the Ninth Circuit did apply the False Claims Act as amended in 1986, the court did not specifically address the issue of retroactive application, and there was no evidence before the court that the claims at issue had been completed by October 27, 1986.

1990) (holding that the "date of payment and not the request" for payment triggers the statute of limitations).[4]

Dolores Petershack was one of the Northern Telecom employees responsible for maintaining the receivable files and payment records in connection with the "switches" at issue in this case. Defendant's Exhibit 3, Declaration of Dolores Petershack, ll 2. From these files, she compiled the following information for the "switch" at each site: invoice number, invoice date, Government acceptance date; shipment number, invoice amount, date of receipt of the Government's check; Government check number; and, the amount received from the Government. *Id.*, 11 5. The compilation of this data shows that, with the exception of claims relating to the switch at Letterkenny Army Depot, all claims were paid before October 27, 1986. A, Attachment to Defendant's Exhibit 3, at 1-4.

Mr. Anderson attempts to refute this evidence by submitting an apparently random selection of invoice copies as Relator's Exhibits 4-9. Of the nineteen invoice copies submitted to the court by Mr. Anderson, however, only three are dated after October 27, 1986. *See,* Relator's Exhibits 4-9. Of these three, one relates to the switch at the Letterkenny Army Depot (Relator's Exhibit 9), and the other two bear no indication of how -- if at all -- they relate to Mr. Anderson's allegations of defective grounding (Relator's Exhibit 5, at 1, 4).

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[4] In its Amicus Brief, the United States does not cite, nor has the court found, any support for its contention that Relator Ted Anderson's cooperation with the Government's investigation, rather than the Government's payment on the claims, determines whether the claims were complete prior to October 27, 1986.

The court finds that Mr. Anderson has failed to make a showing sufficient to establish a genuine dispute of fact as to the date the claims were completed. On these grounds, the court determines that, with the exception of claims relating to the Letterkenny Army Depot switch, the allegedly false claims were paid by the Government prior to October 27, 1986. Thus, the claims at issue were completed prior to the 1986 Amendments to the False Claims Act, and being applied prospectively only, the amended statute does not control in this matter.

The parties do not dispute that Mr. Anderson presented the information upon which his False Claims Act allegations are based to the Government in July of 1988 -- one and one-half years before this action was filed. *See,* Declaration of Ted Anderson, 11 5. Under the pre-amended False Claims Act, an informer with direct knowledge of the fraud who reported the information to the government prior to commencing an action is jurisdictionally barred from bringing suit. *See, United States ex rel. Wisconsin Dept. of Health and Social Services v. Dean*, 729 F.2d 1100, 1105 (7th Cir. 1984) (holding that federal courts are without subject matter jurisdiction where the suit is based upon information in the possession of the government at the time the suit was brought). Mr. Anderson's claims with respect to all switches except the Letterkenny Army Depot switch are therefore dismissed for lack of subject matter jurisdiction.

C. The Letterkenny Army Depot Switch.

As discussed above, the parties do not dispute that claims for the Letterkenny Army Depot switch (the "Letterkenny" switch) were paid after October 27, 1986. See, Attachment to Defendant's Exhibit 3, at 1-4. The 1986 Amendments to the False Claims Act therefore apply to Mr. Anderson's claims regarding this switch, and the court now addresses the merits of Mr. Anderson's false

claim allegations with respect to Letterkenny.

All of Mr. Anderson's false claim allegations relate to the grounding deficiencies of a particular kind of switch known as the "SL-100" switch, a version of which is also called the "DMS-100" switch. These SL-100 and DMS-100 switches are generally alleged to have been subject to grounding problems as a result of Northern Telecom's failure to utilize a "single point ground" system. *See,* Declaration of Thomas Seim Re: Expert Report, Attached Expert Report, at 7. Mr. Anderson alleges that this general grounding defect resulted in the following violations of the SL-100 contract specifications: (1) a digital bit error rate of more 10-8; (2) failure to provide "inherent availability" of "at least 0.99996;" and, (3) a resulting failure to provide a "commercially available state of the art digital telecommunications system." *See,* Relator's Exhibit 11, "AFCC Engineering and Performance Specifications for SCOPE DIAL Digital Telecommunications System," at 46, § 3.3.10 15, at 13, § 3.2.16.2; and, at 5 § 3.

Mr. Anderson does not dispute that when Northern Telecom "repaired" or "enhanced" its SL-100 switches throughout 1987 with an "isolated system grounding" (ISG) technology -- at no cost to the Government -- these alleged grounding deficiencies disappeared. Indeed, Mr. Anderson presents no evidence to the contrary, and Mr. Anderson's own experts apparently concede that this "grounding enhancement" was a solution to the deficiencies they describe.

See, e.g. Declaration of Thomas Seim Re: Expert Report, Attached Expert Report, at 7-8, 17-19; Declaration of Warren Lewis Re: Expert Report, Attached Expert Report, at 13-16.

Every switch at issue here except the Letterkenny switch was sold to the military under a government contract called the

"SCOPE DIAL" contract. The Letterkenny switch was sold under the "CONUS 84-85" contract, which provided the Army with a SL-100 "packaged" switch, as opposed to the SL-100 "custom" switch provided under the SCOPE DIAL contract. Defendant's Exhibit 1, Declaration of Foster N.. Dickson, ll 7.

Mr. Murray Gold was the principal engineer responsible for designing the entire system configuration and grounding arrangements for that switch. Defendant's Exhibit 4, Declaration of Murray S. Gold, ll 3. Mr. Gold states that the SL-100 "packaged" switch installed at Letterkenny was designed with an isolated grounding system from its inception. *Id.*, 11 5. This means that once a single lead was moved in order to reference the logic ground to the battery return, the SL-100 "packaged" switch installed at Letterkenny was completely consistent with the final, "ISG enhanced" SL100 "custom" switch. *Id.*, 1T 5. In summary, the SL-100 switch at Letterkenny had the "ISG" grounding features incorporated into its original design. Thus, the court finds no support in the record for Mr. Anderson's false claim allegations against Letterkenny. Having thus failed to establish a genuine dispute of fact regarding the alleged grounding deficiencies, the court grants defendant's motion for summary judgment with respect to the Letterkenny switch.

D. Constitutionality of the False Claims Act.

Northern Telecom contends that the False Claims Act's *qui tam* provisions are unconstitutional. Congressional enactments, however, are presumptively valid against challenges for constitutional infirmities. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980). Because the court has disposed of Northern Telecom's motion for summary judgment on other grounds, the court declines to reach Northern Telecom's constitutional challenge to the False Claims Act.

In addition, the court declines to grant the parties' request for oral argument on the grounds that it is unnecessary. The parties had ample opportunity to provide the court with evidence and legal argument in support of, and in opposition to this motion. *See, Lake at Las Vegas Investors Group. Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 728-729 (9th Cir. 1991), *cert. denie*d, 112 S. Ct. 1295 (1992).

It is hereby ORDERED, ADJUDGED, and DECREED that:

(1) Relator Ted Anderson's claims with respect to all the SCOPE DIAL switches are DISMISSED for lack of subject matter jurisdiction;

(2) defendant Northern Telecom's motion for summary judgment is GRANTED with respect to the Letterkenny Army Depot switch;

(3) the United States is permitted twenty (20) days from the date of this Order to move to reopen and intervene in this action, and by such intervention seek to cure the jurisdictional defect under former 31 U.S.C. § 3730(e)(4);

(4) Relator Anderson's motion for an order confirming jury trial is STRICKEN as moot; and

(5) the court declines to hear oral argument on this motion.

DATED at Seattle, Washington this 23rd day of April, 1993.

/s/

BARBARA J. ROTHSTEIN STEIN
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
At Seattle

UNITED STATES OF AMERICA *ex rel.*, THEODORE R. ANDERSON, Plaintiff, v. NORTHERN TELECOM, INC ., Defendant.	CASE NUMBER: C90-231R JUDGMENT IN A CIVIL CASE

_ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to trial for hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) Relator Ted Anderson's claim with respect to all the SCOPE DIAL switches are DISMISSED for lack of subject matter jurisdiction;

(2) defendant Northern Telecom's motion for summary judgment is GRANTED with respect to the Letterkenny Army Depot switch;

(3) the United States is permitted 20 days from this date to move to reopen and intervene in this action and by such intervention seek to cure the jurisdictional defect under former 31 U. S.C. § 3730(e)(4);

(4) Relator Anderson's motion for an order confirming jury trial is STRICKEN as moot; and

(5) the court declines to hear oral argument on this motion.

23 April 1993
Date

BRUCE RIFKIN
Clerk

/s/

(By) Deputy Clerk Elizabeth Tyree

FILED
June 22, 1995
Cathy A. Catterson, Clerk
U. S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*, THEODORE R. ANDERSON,	)	No. 93-35520
	)	D.C. NO.
Plaintiff-Appellant	)	C90-231R
v.	)	ORDER
NORTHERN TELECOM, INC .,	)	
Defendant-Appellee.	)	

Before: ALARCON, BEEZER and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Beezer and Judge Kleinfeld vote to reject the suggestion for rehearing en bang and Judge Alarcon so recommends.

The full court has been advised of the suggestion for rehearing en bans and no active judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
July 26, 1995
Cathy A. Catterson, Clerk
U. S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*, THEODORE R. ANDERSON,	)	No. 93-35520
	)	D.C. NO.
Plaintiff-Appellant	)	CV-90-231BJR
v.	)	ORDER
NORTHERN TELECOM, INC .,	)	
Defendant-Appellee.	)	

Before: ALARCON, BEEZER and KLEINFELD, Circuit Judges.

Appellant's "motion to accept motion for filing of the petition for rehearing and recall of the mandate" is hereby DENIED.

FALSE CLAIMS ACT
31 U.S.C. §§ 3729-3730 (1982)

§ 3729. False claims

A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person -

(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of public property or money used, or to be used, in an armed force and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, in an armed force and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; or

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from a member of an armed force who lawfully may not sell or pledge the property.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978.)

§ 3730. Civil actions for false claims

(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

(b) (1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government

(A) by the end of the 60-day period does not enter, or gives written notice to the court of . intent not to enter, the action; or

(B) does not proceed with the action with reasonable diligence within 6 months after entering

an appearance, or within additional time the court allows after notice.

(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

(4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

(c)(1) If the Government proceeds with the action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than 25 percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The
person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

(d) The Government is not liable for expenses a person incurs in bringing an action under this section.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978.)

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 979.)

31 U.S.C. § 3729. False claims

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used,

a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than$5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms"knowing" and "knowingly" mean that a person,

with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,
and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any requestor demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2).Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed

under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating

the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may beheld in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation

.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts(at the Government's

expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and

costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of

the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App..).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions

brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

UNITED STATES OF AMERICA *EX REL.*
THEODORE R. ANDERSON,

Cross-Petitioner/Respondent,

v.

NORTHERN TELECOM INC.,
a Delaware corporation,

Cross-Respondent/Petitioner.

DECLARATION UNDER PENALTY OF PERJURY OF MICHAEL R. McCARTHY

Michael R. McCarthy states as follows:

1. I am the counsel of record for the relator Theodore R. Anderson in this case.

2. I have personal knowledge of the facts attested to below.

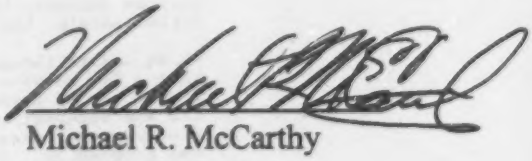
3. Accompanying this Declaration is a true and correct copy of a letter dated November 9, 1988 which was produced from the files of Northern Telecom in response to relator's document request.

4. Accompanying this Declaration is a true and correct copy of a cover letter dated April 23, 1986 and a "DD-250" billing invoice dated April 24, 1986 for the Letterkenny switch which was produced from the files of Northern Telecom in response to relator's document request.

5. Accompanying this Declaration is a true and correct copy of portions of the transcript of the oral deposition of Mr. Foster N. Dickson.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Dated this 23rd day of October, 1995, in King County, Seattle, Washington.



Michael R. McCarthy

NDG Confidential Pursuant to Court Order

northern telecom

Northern Telecom Inc.
[illegible]
Richardson, Texas 75081

Tel. (214) 234-7000
TWX 910-867-4721
FAX (214) 234-7000

CNS:110988:SDM:1010

09 November 1988

Commander
DSAISC-Letterkenny Army Depot
Attn: SITE-CCR (Mr. Seburn)
Bldg 57
Chambersburg, PA 17201-4186

Subject: Signatures required on DD250's

Reference: Letter dated 12 Aug 88, CNS081288:SDM:761

Dear Mr. Seburn:

Just last week this office was questioned by the DCASMA Dallas Production Office as to the status of outstanding DD250's submitted against the Conus '84 & '85 programs.

A great deal of concern exists over the fact that in some instances DD250's were mailed out requesting signature approval back in 1986 and todate they are still outstanding.

This office tried to explain that over the past months, serious attempts have been made to resolve this matter. Unfortunately, the problem still exists.

So as not to inconvenience either party, we ask that you take a few moments to glance through the attached DD250(s). If you are in agreement, we ask that they be signed in block 21B and returned to this office. If you are in disagreement, please drop us a hand written note as to what the problem is. If we've made a mistake in the DD250 itself or if we sent it to your attention in error we need to know. If you're in disagreement with the fact that Northern's position is one of being complete and you are not, we need to talk about it. Monthly follow-on letters are not the solution to resolving this matter.

BEST AVAI

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northern telecom

CMS:110988:SDM:1010
Page 2.

Thank you for your time and cooperation in dealing with this issue. Do not hesitate to contact either the undersigned at 214/301-7938 or Linda Wise at 214/301-7941 should you have any questions or concerns. Again, thank you for your assistance.

Sincerely,

S. Diane Mackey

S. Diane Mackey
Senior Contracts Administrator
Date Communications and Networks

enclosures
SDM:110988:1006:lkw

ABLE COPY

NDM Confidential Pursuant to Court Order

File one

northern telecom

Northern Telecom Inc.
8401 Old Courthouse Road
Vienna, VA 22182-3807

Federal Systems

LTR-86-04-058

April 23, 1986

TP005

Commander
USAISEC-CONUS
Fort Ritchie, MD 21719-6010

ATTN: ASCM-QA

SUBJ: Transmittal of the Final Test Plan for Letterkenny Army Depot Telecommunications System Upgrade.

REF: (a) Contract Number DAAB07-85-C-D085
(b) CDRL Sequence Number 17AA of the DD Form 1423, Attachment 20
(c) Data Item T-5204
(d) SLIN 0017AA

ENCL: (1) Test Plan, System Acceptance, On Site, Draft, two (2) copies.
(2) DD Form 250

Dear Sir:

Pursuant to references (a) through (d), enclosures (1) and (2) are submitted herewith.

Upon Acceptance and completion of Block 21B of the DD Form 250, please return the original and four (4) copies to the address shown in Block 9.

Sincerely,

Northern Telecom Inc.

Ronald I. Tilson
Program Manager
Army CONUS Upgrade

RIT/vl

Enclosure

cc: SITE COR — One copy of enclosure (1)
ASN-OP-IM-S — One copy of enclosure (1)
ASCM-ES-TS — One copy of enclosure (1)
ASN-PP-PA — One copy of enclosure (1)
ASN-SW-A — One copy of enclosure (1)

NDM Confidential Pursuant to Court Order

EQUIPMENT SPECIFICATION TEST PLAN MATRIX
FOR LETTERKENNY
ACOM - CCCH 84125

TEST PLAN LIST NUMBER	SATIS-FACTORY	UNSATIS-FACTORY	GOV'T INITIALS AND DATE	NTI INITIALS AND DATE	REMARKS
29					
30					
31					
33					
35					
40					
46					
54					
NOTE 1		DELETED PSR MEETING JUNE 8-9, 1988			
NOTE 2		CLOSED PSR MEETING JUNE 8-9, 1988			

NDM Confidential Pursuant to Court Order

File one

MATERIAL INSPECTION AND RECEIVING REPORT		DAAB07-85-C-B085		
LTR0003	24 Apr 86	N/A / N/A	Commercial Express Mail	N/A

Northern Telecom Inc. Federal Systems Division, Dept. 3492 8401 Old Courthouse Road Vienna, VA 22180	78406
DCASMA, Baltimore 300 East Joppa Road Hampton Plaza Building, Room 200 Towson, MD 21204	S2101A
See Block 9	
DCASR, Philadelphia P.O. Box 7730 Philadelphia, PA 19101	S3910A
Commander USAISEC-CONUS Attn: ASCH-QA Fort Ritchie, MD 21719-6010	
See Block 13	

0017	AA	Test Plan System Acceptance, on site, IAW CDRL, DD Form 1423, Attachment Number 20, Sequence Number 17AA, Data Item Number DI-T-3204	1	LOT	$14,700.00	$14,700.00

DD FORM 250

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

UNITED STATES OF AMERICA, ex rel., THEODORE R. ANDERSON)

VERSUS) NO. C90-231R

NORTHERN TELECOM, INC., A DELAWARE CORPORATION

ORAL DEPOSITION

OF

MR. FOSTER N. DICKSON

COPY

A I'm with -- well, we just changed. I am with Nortel Federal Systems, Incorporated which is a wholly-owned subsidiary of Northern Telecom, Incorporat

Q How long have you been with Nortel Federal Systems?

A Well, if I am correct they were just incorpora the first of July of 1992.

Q What is your position?

A I am the director of Air Force programs.

Q What generally does that mean?

A Well, generally the programs is the operations side of the function and when something is sold and plac on contract then there is a program management or a program operations group that manages the implementation of that.

Q You're in charge of that for the Air Force?

A Well, for Nortel Federal Systems for Air Force contracts, yes.

Q What type of systems are we talking about?

A Principally they are telephone switches if you will referred to the company nomenclature as an SL-100 o NSL-100 telephone switch.

Q Does Nortel Federal Systems service or provide other support for systems previously sold to the government?

Q His group?

A Yes.

Q What is a DD-250?

A It's a Department of Defense Form 250. I don't recall the exact format but on the format there it identifies obviously whatever it is that the government is signing or acknowledging that this has happened and the DD-250 is after the government signs it, for instance if it was completion or acceptance, I don't recall, of the site survey report the DD-250 was sent to them and that cognizant government person by his signature acknowledges that, yes, that milestone has been met. And then I don't recall if the DD-250 is returned directly back to our contracts function or if it is mailed directly to the government paying office, and then the government paying office would issue a check or whatever in the amount of whatever was approved on the DD-250.

Q Did the DD-250 contain any type of a promise or certification that the equipment was in compliance with specifications?

MR. PALMER: Object to the form. It calls for a legal conclusion.

A I don't recall if there were any of those kinds of statements or whatever on there.

MR. PALMER: It's now 12:30. Unless

Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

No. 95-708

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA *ex rel.*
THEODORE R. ANDERSON,
Cross-Petitioner,

v.

NORTHERN TELECOM INC.,
a Delaware corporation,
Cross-Respondent.

On Petition and Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

NORTHERN TELECOM'S BRIEF IN OPPOSITION TO RELATOR ANDERSON'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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NORTHERN TELECOM INC.

December 1995 * *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

24 pp

QUESTIONS PRESENTED

1. When a court of appeals affirms a district court's grant of summary judgment, does the appellate court exceed its authority under a *de novo* standard of review by reciting and relying on additional undisputed facts evident from the appeal record besides those facts specifically noted in the district court's opinion, when such facts are consistent with the district court's opinion and ruling?

2. Whether the court of appeals and the district court correctly found that the *qui tam* relator here failed to establish that defendant presented any false claims to the Government in connection with the sale of the telecommunications switch at the Letterkenny Army Depot?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to this proceeding are Theodore R. Anderson, who is the relator and *qui tam* plaintiff, and Northern Telecom Inc.,[1] the defendant.

The United States of America did not intervene in the proceedings below and is not a party to this case.

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[1] Northern Telecom Inc.'s parent corporation is Northern Telecom Limited - Northern Telecom Limitee, a Canadian corporation. Northern Telecom Inc.'s subsidiaries are wholly owned.

TABLE OF CONTENTS

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

A. Introduction 2

B. Several of Relator Anderson's Statements of Fact in His Cross-Petition Need Clarification or Correction.. 6

1. Anderson's Statement That the District Court Limited Discovery to Just Seven Military Bases Is Misleading. 6

2. Anderson's Description of the Alleged Problems with Northern's Switches Inaccurately Describes the Evidence in the District Court. 7

C. The Ninth Circuit Did Not Make Alternative Findings of Fact Inconsistent with the District Court's Findings.. 10

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED 14

I. THE COURT OF APPEALS' AFFIRMANCE OF THE DISMISSAL OF CERTAIN OF ANDERSON'S *QUI TAM* CLAIMS IS CONSISTENT WITH THE DISTRICT COURT'S FINDINGS ON SUMMARY JUDGMENT AND ESTABLISHED RULES CONCERNING APPELLATE REVIEW OF A GRANT OF SUMMARY JUDGMENT 14

II. THE FACTS PRESENTED IN THE DISTRICT COURT DO NOT RAISE ANDERSON'S HYPOTHETICAL SECOND QUESTION CONCERNING BILLING FOR ITEMS THAT DO NOT MEET CONTRACTUAL WARRANTIES. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases	Page
Blum v. Bacon, 457 U.S. 132 (1982)	17
Boisjoly v. Morton Thiokol, Inc., 706 F.Supp. 795 (D. Utah 1988)	18
Celotex v. Catrett, 477 U.S. 317 (1986)	15
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	17
Cole v. Ruidoso Municipal Schools, 43 F.3d 1373 (10th Cir. 1994)	17
Conkling v. Turner, 18 F.3d 1285 (5th Cir. 1994)	17
First Pacific Bank v. Gilleran, 40 F.3d 1023 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 55 (1995)	17
Lawshe v. Simpson, 16 F.3d 1475 (7th Cir. 1994)	17
Thigpen v. Roberts, 468 U.S. 27 (1984)	16
White v. Moulder, 30 F.3d 80 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 738 (1995)	17

Statutes, Regulations and Rules

False Claims Act, 31 U.S.C. §§ 3729-3733 (1988)	17

No. 95-708

IN THE

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October Term, 1995

UNITED STATES OF AMERICA *ex rel.*
THEODORE R. ANDERSON,

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v.

NORTHERN TELECOM INC.,
a Delaware corporation,

Cross-Respondent.

NORTHERN TELECOM'S BRIEF IN OPPOSITION TO RELATOR ANDERSON'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Respondent, Northern Telecom Inc. ("Northern"), submits this Brief in Opposition to Relator Anderson's Conditional Cross-Petition for a Writ of Certiorari.

OPINIONS BELOW

See Northern Telecom's Petition for Certiorari in *Northern Telecom Inc. v. United States of America ex rel. Theodore R. Anderson*, Case No. 95-471.

JURISDICTION

See Northern Telecom's Petition for Certiorari in *Northern Telecom Inc. v. United States of America ex rel. Theodore R. Anderson*, Case No. 95-471.

STATUTE INVOLVED

See Northern Telecom's Petition for Certiorari in *Northern Telecom Inc. v. United States of America ex rel. Theodore R. Anderson*, Case No. 95-471.

Northern disputes that Relator Anderson ever raised any issue in the District Court or the Court of Appeals concerning the Fifth Amendment to the U.S. Constitution and denies that Mr. Anderson is entitled to raise a constitutional issue at this stage of the proceedings.

STATEMENT OF THE CASE

Northern refers the Court to the Statement of the Case in its Petition for Certiorari in *Northern Telecom Inc. v. United States of America ex rel. Theodore R. Anderson*, Case No. 95-471. In accordance with Supreme Court Rule 15.2, Northern addresses certain misstatements of fact and law by Relator Anderson that bear on what issues properly would be before the Court if the Cross-Petition is granted.

A. Introduction.

Relator Theodore Anderson brought this action contending that Northern violated the False Claims Act when

it sold certain digital telecommunications switches to the United States military during the 1980s. The United States was notified of the case and declined to intervene.

Northern manufactures and sells digital telecommunications switches. Northern's digital switches are large, complicated, multi-million dollar electronic systems that handle high-speed automated switching of telephone calls for telephone company central offices and large commercial and government facilities, including military bases. The switches Northern sold to the U.S. military met Government specifications and have performed extremely well.

Like any high technology company, Northern is constantly developing new systems, new configurations, and software changes to enhance its products. During the 1980s Northern's engineers considered a proposed change in the grounding configuration of Northern's switches. After a great deal of study and debate, Northern's engineers ultimately decided that the benefits of isolated system grounding outweighed the risks and that such a grounding array could increase the robustness of Northern's switches and facilitate features for Northern's switches that were planned for the future. That change was called isolated system grounding and involved minor changes to the internal wiring of Northern's switches. Implementation of it reflected a departure from past wisdom about how to design the internal grounding of telecommunications switches.

After Northern's engineers decided to implement the isolated system grounding change, Northern provided this change to the United States military at no charge and arranged to have its technicians visit switches at military bases to implement the change.

Anderson, a non-engineer technician with a limited education, worked at several Northern telephone switch sites

to help implement various routine switch modifications and repairs. While employed by Northern, Anderson became aware of the internal debate among Northern's telecommunications engineers about the merits and potential problems with the change to isolated system grounding.

Anderson was not involved with Northern's development of the isolated system grounding array for its switches and lacked any specialized engineering expertise. Anderson was merely a spectator who observed certain portions of the internal debate among engineers. Anderson was easily swayed by statements reciting the presence of "current on the frame of switches," not realizing that some low-voltage DC currents traditionally had been present on properly installed telephone switches and caused no threat to human safety or switch performance.[2]

After Anderson left Northern's employ he sought to avenge various personal grievances arising out of his employment at Northern. Anderson seized on information he had heard about isolated system grounding and used it to accuse Northern of wrongdoing. According to Anderson, such wrongdoing occurred because Northern sold certain telecommunications switches to the U.S. Air Force in the early 1980s that were designed with an integrated grounding array rather than isolated system grounding. In Anderson's view, any switch that Northern had sold at any time that lacked isolated system grounding was *per se* defective even if

---

[2] In this action, Anderson seized on such statements about current on switches, failing to distinguish between the safe low voltage DC currents that power such things as telephone switches, flashlights, children's toys, and transistor radios, and potentially harmful AC currents, which are not used to power telephone switches.

the switch was safe, performed well, and worked according to all specifications.

In the first phase of Anderson's campaign against his former employer, he sought to have the Government, through a grand jury, bring a criminal indictment against Northern and Anderson's former supervisors in the U.S. District Court for the District of Colorado. After exhaustive investigation by the FBI and the Departments of Justice and Defense, including numerous interviews of Northern representatives and grand jury testimony by several Northern employees, the U.S. Attorneys and grand jury handling the case found no basis for any charges.

Anderson also pursued self-help remedies in his campaign to harass Northern. He admits he broke into Northern's offices and stole documents including a Northern customer list. He also sought to sell his services as a consultant to Northern's customers who could supposedly assist them in bringing suit against Northern. He also sought to have his former boss's secretary destroy his personnel file to aid him in a wrongful discharge suit. *See* Ninth Circuit: Northern Ex. R., CR 93, Ex. 6(A), vol. 1, at 155-67, 180-200; vol. 2, at 234-48; *Anderson v. Northern Telecom Inc.*, No. 90-2-02940-9 (case filed in state court in King County, Washington, which Anderson voluntarily dismissed).

Having failed in all of his prior zealous efforts to accuse Northern of some sort of wrongful behavior, Anderson brought this *qui tam* action in the U.S. District Court for the Western District of Washington on February 13, 1990.

B. Several of Relator Anderson's Statements of Fact in His Cross-Petition Need Clarification or Correction.

Several statements of fact by Anderson in his conditional Cross-Petition need clarification or correction.

1. Anderson's Statement That the District Court Limited Discovery to Just Seven Military Bases Is Misleading.

Anderson states that "the district court limited discovery to just seven military bases . . . ." Cross-Petition, at 4. Anderson's complaint did not allege specific facts demonstrating that Northern submitted false claims for payment for the telecommunications switches at *any* particular military installations. Instead, Anderson sought to use the federal court's discovery tools to embark on a fishing expedition searching for evidence of false claims. Anderson initially conducted discovery concerning all SL-100 telephone switches that Northern sold to the U.S. military during the 1980s under three separate contracts (approximately 80 switches). The District Court intervened in discovery, however, when Anderson sought to abuse the discovery tools (for example, by seeking to have Northern identify and produce for Anderson every document with the word "grounding" in it in every file maintained by any of Northern's 49,000 employees in any of Northern's hundreds of offices worldwide).

The District Court eventually ordered Anderson to designate up to nine representative military bases where Anderson believed the evidence would show that Northern submitted a false claim in connection with the sale of a switch between 1984-87. Northern Ex. R. CR75 (Oct. 26, 1992 Order). With the consent of the parties, the District Court

bifurcated the case and ruled that it would consider Anderson's evidence of liability based on this representative group of bases designated by Anderson himself, and would reserve the question of damages for later determination if Anderson proved liability. Anderson responded by designating nine representative bases, which he later reduced to only seven. The remaining document discovery was concentrated on the switches at those bases. Northern made available and Anderson's counsel reviewed documents relating to all aspects of the installation, testing, and operation of the telecommunications switches at those seven military bases.

Thus, the District Court did not place any artificial limits on Anderson's discovery. Instead, it recognized that he lacked specific information about particular bases and placed reasonable limits on his discovery efforts.

2. Anderson's Description of the Alleged Problems with Northern's Switches Inaccurately Describes the Evidence in the District Court.

Anderson contends that Northern's telecommunications switches had a "defective grounding design that made it impossible for the systems to comply with numerous warranties and specifications, including warranties that the systems complied with the National Electrical Code, met a 10^{-8} 'digital bit error rate,' were 'state of the art' and were free of defects." Cross-Petition at 5; *see also id.* at 9-12, 21. The statements in the Cross-Petition inaccurately describe the evidence about Northern's switches that the parties presented in the District Court.

a. National Electrical Code. The evidence presented to the District Court demonstrated that the National Electrical Code was never intended to apply to the internal wiring of

telecommunications switches. Consequently, Anderson's reference to the National Electrical Code is misplaced and inaccurately describes the specifications for Northern's switches.

Anderson made alarmist references in the District Court to alleged violations of the National Electrical Code, while failing to explain that that Code was not even intended to and did not apply to internal wiring of "utilization equipment" such as telephone switches. Ninth Circuit: Northern Ex. R. CR112, at 16-20. Anderson neglected to inform this Court that the so-called "Position Paper" from which he quotes, Cross-Petition at 10, appears to have been a forged document; the person alleged to have written it testified that he had nothing to do with its preparation. Indeed Anderson's own retained expert conceded that the National Electrical Code provides little or no guidance on proper methods of grounding telephone switches and that the industry standards for this are Bellcore technical memoranda. (Bellcore is the research and development company that serves regional Bell telephone operating companies, which are some of Northern's largest customers.) Anderson's expert also conceded that Northern's integrated grounding design was consistent with relevant Bellcore standards for performance and safety of telephone equipment.

Thus, the evidence in the District Court did not support Anderson's contention that Northern's grounding configuration violated any Government specification relating to the National Electrical Code.

b. Bit Error Rate. Each time Northern installed a telecommunications switch, it put that switch through months of complex installation and acceptance testing to confirm that all aspects of the switch were performing according to specifications. The military does not place a telecommunications switch in service and pay for it until the

switch has gone through extensive testing to verify that the switch is performing according to specifications. For military switches, a military observer participated in the installation and acceptance testing and confirmed in writing that each test had been passed. The evidence in the District Court demonstrated that Northern's switches successfully completed all installation and acceptance tests at the time they were turned over to the Government, including the test for digital bit error rate. Northern Ex. R. CR93 (Bailey Declaration).

Anderson contended that the Government found Northern's switches were not in compliance with a digital bit error rate specification. Yet the evidence before the District Court demonstrated that his contention was based on a faulty test carried out by the Air Force early in its administration of the SCOPE-DIAL contract with Northern. The Air Force's 1815th Operational Test Evaluation Squadron responsible for this testing discovered that it had made a mistake in how it set its testing equipment and when it repeated those tests on a Northern switch, the switch passed and the Air Force acknowledged its mistake. Northern Ex. R. CR113 (Haunschild Declaration).

c. State of the Art/ Free of Defects. Lacking any evidence of a failure to meet actual specifications, Anderson's lawyers contended that Northern submitted a false claim because its switches were not "state of the art" or "free of defects." Cross-Petition at 5. Anderson contends that "express contractual warranties" were not met, *see, e.g.*, Cross-Petition, at 21, but he was and is unable to identify or quote the warranties that were allegedly breached. Anderson hired computer engineers who had never worked on the design of telephone switches. They sought to engage in an esoteric debate about what telephone switch designs were state of the art. Anderson also made circular arguments that the switches were not free of defects. Anderson presented declarations from a Tom Crawford and Bill Crawford, which,

contrary to Anderson's misleading summary of them in his Cross-Petition, at 11, did not confirm the existence of any problem with Northern's switches. These declarations said in essence that *if* Anderson's allegations were true, the Air Force would have wanted to know about it. The Court of Appeals correctly recognized that this evidence "does not establish a genuine issue as to whether Northern Telecom knowingly presented a false claim for the Letterkenny Army Depot switch." Northern Petition, Appendix A, at 12a. The District Court and the Ninth Circuit properly rejected Anderson's unsupported and misleading arguments.

Thus Anderson's arguments about Northern's alleged failure to meet contractual warranties and specifications represent mere rhetoric, unsupported by evidence in the District Court.

C. The Ninth Circuit Did Not Make Alternative Findings of Fact Inconsistent with the District Court's Findings.

Mr. Anderson only designated one representative military base having a Northern telecommunications switch paid for after October 27, 1986 (the date Congress amended the False Claims Act): Letterkenny Army Depot. The District Court found that the "packaged" SL-100 switch installed at Letterkenny already had the grounding features, the lack of which Anderson contended made Northern's switches defective. Northern's Petition for Certiorari, No. 95-471, Appendix B, at 24a-26a. Therefore it granted summary judgment dismissing Anderson's False Claims Act allegations relating to that military base. *Id.* In reaching this conclusion, the District Court noted the timing of the invoices submitted relating to this switch, and the timing of Northern's implementation of its isolated system grounding enhancement. *Id.* at 23a, 25a.

The Ninth Circuit reviewed the same evidence that was before the District Court on summary judgment, applying a *de novo* standard of review. Northern's Petition for Certiorari, No. 95-471, Appendix A, at 9a. It affirmed the District Court's grant of summary judgment, holding that there is "no evidence in the record that Northern Telecom knowingly presented a false or fraudulent claim for the switch." *Id.* at 12a. That ruling is correct and is based on undisputed evidence in the record.

The Ninth Circuit quoted more of the undisputed evidence in the summary judgment record than the District Court had quoted. Nevertheless, it reached the same conclusion, that Anderson had failed to present facts demonstrating that Northern knowingly submitted a false claim in connection with the grounding of the Letterkenny switch. The Court of Appeals correctly noted that the Government did not pay for the Letterkenny switch until Northern had resolved all issues concerning the switch. *Id.* at 11a-12a.

Northern had clearly argued in support of summary judgment in the District Court that it did not submit any false claim in connection with the Letterkenny switch. Northern Ex.R. CR96, at 39-47. Northern submitted detailed information to the District Court about when the Government received invoices for and paid for the switch components whose grounding design Anderson argued to be defective. Anderson Ex.R. at 11-17 (Petershack Declaration). In arguing in favor of summary judgment, Northern made the very arguments embodied in the Court of Appeals and District Court decisions. Challenging the sufficiency of Anderson's evidence about Letterkenny, Northern argued:

> At the time this [10/31/86] memo was written, the Army had not accepted the switch yet, even though the switch had been placed in service. The Type III

> acceptance testing was underway. . . . Northern was still completing the commissioning process and correcting installation problems that had been noted. The document simply indicates that Northern recognized problems that needed to be corrected before the Army would accept this switch. The reason Northern did acceptance testing was to identify problems like these. This document does not demonstrate the switch was not performing according to contract specifications at the time the Army accepted it.
>
> The SL-100 telephone switch at Letterkenny was a "packaged switch" that had the grounding enhancement already built into the design of the switch. . . . Therefore, this document does not support the theory of Relator's computer engineers that the design of Northern's switches was defective because they lacked the ISG "grounding enhancement."

Northern Ex. R. CR96, at 47 (Northern's summ. judg. brief).[3]

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[3] Thus, Anderson's statement that: "NTI's summary judgment brief in the trial court did not mention the timing of the Letterkenny 'claims for payment' as a basis for granting its motion," Cross-Petition at 7, is inaccurate. Similarly, Anderson's statement that the timing of the billing of the Letterkenny switch "was neither briefed nor orally argued in the Ninth Circuit," *Id.* at 17-18, is also inaccurate. Northern's August 24, 1993 Brief of Appellee filed in the Ninth Circuit specifically raised this basis for summary judgment, explaining that the alleged deficiencies in the Letterkenny switch occurred while Type III acceptance testing was still underway "before Northern turned it over to the Government and received the first payment from the Government . . . ." Brief of Appellee, at 31-32. Northern noted that Anderson had not even responded to this contention in the District Court. *Id.* at 32.

If Anderson had any evidence that a false claim had been submitted in connection with the Letterkenny switch, the time to present that evidence to the District Court was before it granted summary judgment against him. Anderson's belated argument that he "has never been afforded the opportunity in the Ninth Circuit or the district court to submit evidence or argument responsive to" the Court of Appeals' analysis, Cross-Petition at 6, is absurd. In addition, his argument that the Court of Appeals' ruling is based on a mistake of fact is incorrect. The District Court and the Ninth Circuit essentially adopted Northern's rationale for granting summary judgment. Anderson had notice of that rationale and a full opportunity to respond with evidence and argument during the summary judgment briefing process. Anderson had the burden of proof in the District Court to prove through competent evidence the existence of each alleged false claim. He failed to come forward with evidence to support his allegations.

Anderson has attached documents to his Cross-Petition that he never submitted to the District Court; these documents were not part of the appeal record in the Ninth Circuit. *See* Anderson Cross-Petition, Appendix A51-A59. Anderson's attempt to supplement the summary judgment record with a Declaration filed for the first time here in the Supreme Court is improper and merely confirms that the appeal record does not support his argument. Northern objects and requests that this new Declaration be stricken or ignored. This Court's rules do not provide for "evidence" to be presented for the first time on a petition for certiorari.

Nevertheless, even Anderson's new submission does not prove his False Claims Act allegations. The new documents that he submits, without any foundation to explain them, at best indicate that Northern prepared a test plan in 1986 for about $14,000 for an upgrade at the Letterkenny Army Depot. A test plan is a document, not a piece of equipment whose components are grounded. These new documents

from Anderson do not establish in any way that the grounding design for the Letterkenny switch was defective or that Northern submitted any false claim for payment in connection with that switch. Anderson's entire theory is based on the grounding design of Northern's switches; yet these additional documents have nothing to do with electrical grounding. Anderson tried submitting random assortments of documents to the District Court, which found that tactic unpersuasive: "Mr. Anderson attempts to refute this evidence by submitting an apparently random selection of invoice copies . . . [two of which] bear no indication of how -- if at all -- they relate to Mr. Anderson's allegations of defective grounding." Northern's Petition for Certiorari, No. 95-471, Appendix B, at 23a.

This Court, too, should reject Anderson's misstatements of fact concerning the Letterkenny Army Depot switch.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISMISSAL OF CERTAIN OF ANDERSON'S *QUI TAM* CLAIMS IS CONSISTENT WITH THE DISTRICT COURT'S FINDINGS ON SUMMARY JUDGMENT AND ESTABLISHED RULES CONCERNING APPELLATE REVIEW OF A GRANT OF SUMMARY JUDGMENT

Anderson contends that the Ninth Circuit affirmed summary judgment here on a basis as to which he "never had fair opportunity to submit responsive evidence or argument." Cross-Petition, at 14. Based on this faulty premise, he asks this Court to clarify the law about when courts of appeals may affirm awards of summary judgment, even though the law is clear that appellate courts may affirm judgments on alternative grounds.

This case does not present an appropriate instance for clarifying when appellate courts may affirm judgments on alternative grounds. The Ninth Circuit's ruling affirming the District Court's grant of summary judgment was based on the evidence in the record, was consistent with the District Court's ruling, and did not expand the relief the District Court granted.

When Northern filed its motion for summary judgment and supporting evidence, Anderson became obligated to come forward with evidence of his own to establish each of his claims. *See, e.g., Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986). Northern contended, among other things, that Anderson lacked evidence to prove that Northern submitted any false claim to the Government. Northern Ex. R. CR96, at 39-47. Northern supported its motion with detailed evidence. Northern submitted documentation establishing the terms of the relevant contracts and the detailed performance specifications that defined the requirements that the Government wanted Northern's switches to meet. Northern submitted evidence demonstrating that its switches met the Government's performance specifications and successfully completed installation and acceptance testing. Northern also submitted evidence specifying the following information for the switch at each site: invoice number, invoice amount, date of receipt of the Government's check, Government check number, and amount received. Northern Petition, Appendix B, at 23a. Through this process, Northern challenged Anderson to come forward with any evidence he had supporting his allegations of false claims.

Anderson vigorously opposed Northern's summary judgment motion. He specifically argued that the District Court should focus on the date the Government paid each invoice rather than the date each invoice was submitted. Northern Ex. R. CR109, at 35. In this context, Anderson argued that invoices for the Letterkenny switch were

presented in 1987. *Id.* He presented various documents that he contended support his claims. If he had *any* evidence supporting his allegations, he knew that he better get that evidence before the court. He plainly knew that Northern contended that the Government did not accept the Letterkenny switch or pay for it until after all installation and acceptance testing had been completed.

Anderson would not have done anything differently in opposing summary judgment had he known the District Court or Court of Appeals would pay attention to the dates Northern submitted claims for payment to the Government for the Letterkenny switch and the dates the Government paid those claims. Anderson knew that the dates particular claims for payment were submitted and paid were relevant. In opposition to summary judgment, he submitted what the District Court called a "random selection of invoice copies." Northern Petition, Appendix B, at 23a. If he had other invoices to submit along with evidence tying such invoices to his electrical grounding allegations, he was on notice that the time to submit them was before the District Court granted summary judgment, rather than years later as an appendix to a petition for certiorari.

Anderson cannot reasonably claim that he lacked a fair opportunity to submit evidence and argument responsive to Northern's summary judgment motion. Similarly he cannot claim surprise at the rationale adopted by either the District Court or the Court of Appeals, given that both courts based their rulings on evidence and arguments advanced by the parties during the summary judgment process.

The law is clear that an appellate court may affirm a decision on any ground supported by the record. This Court's decisions so state. *See, e.g., Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) ("we may affirm on any ground that the law and the record permit and that will not expand the

relief granted below"); *see also Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). The courts of appeals are not in disagreement about this fundamental precept of appellate procedure. *See, e.g., Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1382 (10th Cir. 1994); *First Pacific Bank v. Gilleran*, 40 F.3d 1023, 1024 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 55 (1995); *White v. Moulder*, 30 F.3d 80, 82 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 738 (1995); *Conkling v. Turner*, 18 F.3d 1285, 1296 n.9 (5th Cir. 1994); *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir. 1994).

Therefore, the Ninth Circuit's decision to affirm the dismissal of Anderson's claims relating to the Letterkenny Army Depot switch was proper under any articulation of the rule for affirming summary judgment rulings. Its decision was supported by the appeal record and did not expand the relief granted below. Granting certiorari on that issue here would not clarify any legal principle.

II.

THE FACTS PRESENTED IN THE DISTRICT COURT DO NOT RAISE ANDERSON'S HYPOTHETICAL SECOND QUESTION CONCERNING BILLING FOR ITEMS THAT DO NOT MEET CONTRACTUAL WARRANTIES

Anderson is correct that this Court has written relatively few decisions construing the False Claims Act. For the reasons stated in its Petition, Northern believes that the Ninth Circuit's ruling on retroactivity issues raises issues of national importance concerning both the False Claims Act and other potentially retroactive legislation.

Nevertheless, the Ninth Circuit's ruling here on the scope of the False Claims Act as it applies to post-1986 conduct reflects a correct interpretation of the Act. The Ninth Circuit correctly stated that liability under the False Claims Act arises from the knowing presentation of what is known to be false, as opposed to innocent mistakes or negligence. Northern Petition, Appendix A, at 10a.

Here, viewing the evidence in the light most favorable to Anderson, there is evidence of extensive discussion among engineers about what was the most effective way to ground switches, followed by implementation of a grounding change when a consensus developed among the engineers. There is no evidence that any switch failed to meet the Government's performance specifications once installation and acceptance testing were completed and the Government paid for the switch. Debate among engineers about engineering issues does not constitute submission of a false claim when all equipment sold to the Government was tested for and met the Government's own performance specifications. Both the District Court and the Court of Appeals conducted a detailed review of the facts relating to Anderson's claims and found there was insufficient evidence to sustain his allegations of a false claim relating to the Letterkenny switch.

Given this factual record, this is not an appropriate case to clarify the law about what kinds of conduct constitute a violation of the post-1986 False Claims Act, or the extent to which government awareness of a problem with a product defeats an allegation that a false claim was submitted. *Cf. Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp. 795 (D. Utah 1988). The Ninth Circuit's decision below concerning the Letterkenny switch does not implicate either of those issues or any other important legal issue under the False Claims Act.

CONCLUSION

Relator Anderson's conditional cross-petition for a writ of certiorari should be denied.

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Respectfully submitted,

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